IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 14TH MARCH 2007 / 23RD PHALGUNA 1928

AS.No. 329 of 1996(B)

OS.18/1985 of SUB COURT, MAVELIKKARA

.....

APPELLANT/1st DEFENDANT::

P. RAGHAVAKURUP, NEDIYATHU KIZHAKKETHIL,
PULLIKKANAKKU MURI FROM KADUVINAL VEEDU,
KAPPIL MEKKU MURI, KAYAMKULAM VILLAGE.

BY ADV. SRI.K.P.KYLASANATHA PILLAY
SREEDEVI KYLASANATH,P.SREEKUMAR
SRI.PIRAPPANCODE V.S.SUDHIR
SRI.BENOY SASI

RESPONDENTS/PLAINTIFFS:

---

1. P.RAMAKRISHNA KURUP, KADUVINAL VEEDU,
KAPPIL MEKKUM MURI, KAYAMKULAM VILLAGE.

2. SANKARAKURUP OF DO. DO.

3. K. BHARATHI KUNJAMMA OF DO. DO.

4. B. JAYA OF DO. DO.

5. B. SANTHOSH OF DO. DO.

6. B. SATHEESH CHANDRAN OF DO. DO.

7. K. DEVAKI KUNJAMMA, KADUVINAL THARAYIL FROM
DO. DO.

8. JANARDHANA KURUP OF DO. DO.

9. D. RADHAMMA KUNJAMMA OF DO.

10. SREEHARI OF DO. DO.

11. SREEJITH OF DO. DO.

12. SREEKANTH (MINOR) REPRESENTED BY HIS MOTHER D. RADHAMMA KUNJAMMA OF DO. DO.

13. D. RUGMINI KUNJAMM, THENUR VEEDU, CHADAYAMANGALAM FROM DO. DO.

14. R. DEEPAK OF DO. DO.

15. R. GOPESH (MINOR) REPRESENTED BY MOTHER D. RUGMINI KUNJAMMA OF DO. DO.

16. R.GAYATHRI (MINOR) REPRESENTED BY MOTHER D. RUGMINI KUNJAMMA OF DO. DO.

17. K.BHARGAVI KUNJAMMA, KADUVINAL PUTHEN VEEDU, DO. MURI, DO VILLAGE.

18. R. VISWANATHA KURUP OF DO. DO.

19. K. MADHUSUDHANAN OF DO. DO.

20. K. SURENDRANATH OF DO. DO.

21. B. REMADEVI OF DO. DO.

22. K. SREEKUMAR, OF DO. DO.

23. MURALEEDHARA KURUP OF DO.

24. B. PRASANNAKUMARI, ASWATHIYIL, DO. DO.

25. N. ANOOP OF DO. DO.

26. P. MAYA (MINOR) REPRESENTED BY MOTHER B. PRASANNAKUMARI, OF DO. DO.

BY ADV. SRI.P.G.PARAMESWARA PANICKER
SRI.P.GOPAL

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 14/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T.SANKARAN,J.

A.S. NO. 329 OF 1996

Dated this the 14th day of March, 2007

J U D G M E N T

This appeal arises out of O.S. No.18/1985 on the file of the court of the Subordinate Judge of Mavelikara. The appellant is the 1st defendant in the suit. The suit was filed by 26 members of Kappil Mekkum Muri Kaduvinal tharavad (herein after referred to as Kaduvinal Tharavad or as Tharavad) against the appellant herein and two others, who are also members of the same Tharavad. The reliefs prayed for in the suit are the following:

(a) A declaration that the plaint schedule properties belong to the family trust, the family being Kaduvanal Tharavad;

(b) To remove the 1st defendant from the management of the trust;

(c) To frame a scheme for the proper management of the trust providing equal participation and rights to the members of the Tharavad;

(d) For an injunction restraining alienating or committing waste of the property and restraining change of management of the school; and

(e) To appoint a receiver to manage the properties.

2. The suit was contested only by the appellant-1st defendant. The 2nd defendant supported the plaintiffs while the 3rd defendant remained ex parte. The trial court granted a declaration that plaint items 1 to 8 inclusive of the school buildings and accessories but excluding Ext.B1 property, are trust properties. It was held that Ext.A1 and A11 documents are binding on the parties to the suit. The prayer to remove 1st defendant from the management of the trust properties was disallowed. However, it was made clear that he should manage the trust properties as per the terms of Exhibits A1 and A11. The parties were directed to produce a draft scheme for the administration of the trust properties in terms of Exhibits A1 and A11, within a period of three months. A permanent prohibitory injunction was granted restraining the 1st defendant from alienating trust properties and transferring the management of the same. No appeal was filed by the plaintiffs challenging the refusal of the relief to remove the 1st defendant from the management. The 1st defendant- appellant challenges the decree as now granted by the court below.

3. The common case of the parties and the

facts admitted by them are the following. The parties belong to Kaduvinal Tharavad. The Tharavad had extensive properties. Those properties were partitioned as per Exhibit. A1 Partition Deed dated 1.12.1958. As per Exhibit A1, the items shown in Schedule - I therein belong to the family temple. The properties shown in Schedule -2 of Exhibit. A1 were earmarked for sale to meet the necessary expenditure to be incurred for renovation and repair of temple and the expenses in connection with the affairs of the temple. Executant No.2 in Exhibit.A1 is the 1st defendant in the suit. As per the terms of the Partition Deed, Executant Nos. 2 & 3 were authorised to sell the items shown in Schedule - 2 and to appropriate for the purposes mentioned in the Partition Deed. It is stipulated in Exhibit. A1 that a meeting of the members of the family shall be convened twice in a year at the family house and accounts and expenditure shall be settled at that meeting. It is further stipulated that none of the items of Schedule-1 of Exhibit-A1 shall be transferred. For keeping the valuable articles of the temple, one room in the family house is earmarked and the articles shall be kept under lock and key by Executant Nos. 2 and 3. Executant No.2 shall manage the affairs of the temple and

the properties in Schedule -1. After his death, the senior most member in the Tharavad shall be in management. If for any reason, it is found that such senior most member is incapable of performing his duties, the members would be entitled to nominate another person. The expenses for the temple are to be incurred with the co-operation of all the members under the leadership of Executant No.2 and after his death under the leadership of the senior most member. Properties in Schedule-2 of Exhibit-A1 shall be sold only by Executant Nos. 2 and 3. After sale of the properties in Schedule -2, the accounts shall be presented before the members. If it is found that the amounts received by sale of the properties were insufficient for meeting the expenses, the said expenditure were to be met equally by all the members of the Tharavad. A specific mention is made in Exhibit-A1 Partition Deed that a meeting of the committee shall be convened twice in a year on specific dates viz., a day prior to "Thiruvathira in Dhanu" and a day prior to "Thiruvathira in Meenam". The above stipulations in Exhibit-A1 would clearly show that the person to be in management has the status of a trustee and that the properties in Schedule-I of the Partition Deed constitute the trust properties of the family temple. The

position of the senior most member in management is that of a trustee and he cannot act according to his whims and fancies. He shall act only in accordance with the terms of Exhibit. A1 and in consultation with the members of the family. He is bound to account the income and expenditure to the members of the family. He cannot claim any special rights or individual rights in the properties shown in Schedule-1 and 2 of Exhibit. A1.

4. It would appear that the management of the temple and the properties mentioned in Schedule -1 did not take place as provided in Exhibit-A1 and as decided by the members of the family in the manner manifested in Exhibit-A1. Items 4, 7 and 8 of Exhibit-A1 were sold on 1.2.1982 by the 1st defendant as per Ext.A7 Sale Deed in favour of a stranger as if those items belong to the 1st defendant exclusively and disclaiming the rights of the members of the Tharavad. On the same day viz., 1.2.1982, plaint Schedule items 6 to 8 were purchased by the 1st defendant as per Exhibit. A8 for the same sale consideration shown in Exhibit. A7 viz., Rs. 7,000/-. The purchase under Exhibit A8 is made in the individual name of the 1st defendant claiming to be the absolute owner of the property and disclaiming any right of any member of the Tharavad. It would appear that disputes arose

between the 1st defendant on the one hand and rest of the members of the family on the other hand. Plaint schedule items 6 to 8 situated adjacent to the temple, which were purchased as per Exhibits A8 in the name of the 1st defendant, were filled up and converted into paramba. The 1st defendant, in his individual name, applied for establishing a school in those items. Sanction was granted for establishment of a school which was named as "Viswabharathi Model High School". The 1st defendant was approved as the Manager of the school. Buildings were constructed, and appointments of teachers and non-teaching staff were made by the 1st defendant. It is stated by the plaintiffs that the 1st defendant did not take the other members of the tharavad into confidence and he acted against the interests of the members of the Tharavad. Disputes were attempted to be resolved by the execution of Exhibit A11 "Trust Udampady" dated 7.4.1982 in which the 1st defendant and the senior most members of the family are signatories. The nomenclature of Exhibit A11 is that it is a trust deed. The recitals in Exhibit A11 would show that Exhibit A1 and the stipulations contained therein were accepted by the executants of Exhibit A11. It is stated in Exhibit A11 that the renovation of

the temple was made by utilising funds after sale of the items shown in Schedule -2 of Exhibit A1 partition deed. Items belonging to the trust were shown in the schedule to Exhibit A11. The executants of Exhibit A11 were aware of the change in law and the status of the members of 'Marumakkathayam Tharavad' by the advent of the Kerala Hindu Joint Family System Abolition Act, Act 30 of 1976. It is stated that Act 30 of 1976 necessitated the execution of a trust deed as the Tharavad ceased to be in existence by the abolition of 'Marumakkathayam system'. It is stated that Exhibit A11 is executed for the proper management of the temple and the High School. It is further stated in Exhibit A11 that certain items of properties included in Schedule -1 of Exhibit A1 were sold by the 1st defendant in favour of a stranger as per Document No.381 of 1982 (Exhibit A7) and on the same day as per Document No.382, items of properties were purchased in the name of the 1st defendant (Exhibit A8 - plaint schedule items 6 to 8). It is further stated that total extent of the trust properties is 4 acre and 24 cents including Exhibit A8 items, namely, items 6 to 8 of the plaint schedule. Mention is made of a meeting of the members of the family. It is stipulated that the 1st defendant

shall continue to be in management , taking into account his age and respectability. After the death of the 1st defendant, it is stipulated in Exhibit A11, that the management shall vest in a committee consisting of five senior members of the family and the manager shall be elected by such committee. Provision is made in Exhibit A11 for removal of the person in management. Members have to meet once in six months and accounts are to be settled in that meeting. Another important stipulation in Exhibit-A11 is that the signatories agreed to treat the properties scheduled to Exhibit A11 as "devaswom property" subject to Exhibit A1- partition deed

5. The contentions raised by the parties are to be viewed in the light of the facts mentioned above and the stipulation contained in Exhibits A1 and A11. The case of the 1st defendant is that items 6 to 8 of the plaint schedule are his self acquisitions and that they are not trust properties. He contended that the buildings of the school were constructed by spending his own funds and the trust has no rights in respect of the same. According to him, only plaint schedule items 1 to 5 are the trust properties. Out of item 1 of schedule 1 of Exhibit A1, an extent of 4 cents was alienated in favour of N.S.S.

Karayogam. The amount fetched by the sale of Exhibit A7 properties was adjusted by the 1st defenant towards the amount due to him from the trust. Items 6 to 8 purchased by the 1st defendant were paddy fields and he converted the same into garden land spending his own money. The 1st defendant applied for sanctioning of the school in his individual capacity. The school was established in items 6 to 8. The accessories and articles available in the school belong to the 1st defendant. No contribution from the public or teachers was received by the 1st defendant as contended by the plaintiffs. The 1st defendant also raised a contention that Exhibit A11 dated 7.4.1982 is not valid and binding on the trust. Exhibit A11 was executed in flagrant violation of the terms of Exhibit A1 partition deed. Exhibit A11 was not acted upon by any of the beneficiaries of the trust. The 1st defendant also contended that Exhibit A11 was executed under undue influence, coercion, fraud and force exerted by plaintiffs 1, 8, 20 and the husband of plaintiff No.17. The 1st defendant is the manager of the school and he was recognised as such by the educational authorities and he cannot be removed from the Managership. Provisions of Exhibit A1 partition deed are sufficient for the management of the trust properties.

6. Before the trial court, Pws 1 to 3 were examined on the side of the plaintiffs. PW3 is the Commissioner, who prepared Exhibits C1 to C4. The 8th plaintiff was examined as PW1. Exhibits A1 to A26, B1 to B15 and C1 to C4 are the documents marked in the case. DW1 and DW2 were examined on the side of the 1st defendant. DW1 is the son-in-law of the 1st defendant. The 1st defendant did not appear before the court for being examined as a witness, in spite of his contention that Exhibit A11 was executed under undue influence, coercion, threat and force. DW2 is a document writer and he was examined to prove that items 6 to 8 were nilam and it was filled up by the 1st defendant. The evidence of DW1 also would indicate that items 6 to 8 are adjacent to the temple.

7. The court below considered the documentary and oral evidence in detail and held that items 1 to 5 are admittedly trust properties belonging to Kaduvanal family trust that the contention of the 1st defendant that plaint items 6 to 8 are his self acquired properties cannot be sustained and that Exhibit A10 proves that thandaper of items 1 to 8 of the plaint schedule stands in the name of Panayannarkavu Bhagavathi Temple (it is admitted by all that Panyannarkavu Bhagavathi is the diety in

the family temple). The trial court also held that Viswabharathi Model High School and its assets belong to the family trust. Exhibit A19 was taken note of by the court below which shows that the thandaper account though stands in the name of 1st defendant, thandaper number shown is that of the family trust. Exhibit A2 shows that several items of properties including plaint items 6 to 8 are shown in the thandaper account of Panayannarkavu Bhagavathi Temple. The trial court held that the constructions were effected in the plaint schedule items 6 to 8 for and on behalf of the trust. It was held that the 1st defendant failed to produce any accounts and none of the accounts were presented before the members of the trust as stipulated in Exhibits A1 and A11. The evidence of Dw1, the son-in-law of the 1st defendant, that the buildings were constructed with the income derived from the properties belonging to the 1st defendant was not accepted by the court below. Constructions were effected by the 1st defendant knowing fully well that the properties belong to the trust. However, the court below, as stated above, thought it is not proper to remove the 1st defendant from management. On the other hand, it was held that a scheme is to be framed for the proper management of the trust

and trust properties.

8. The main contention of the 1st defendant is that items 6 to 8 of the plaint schedule are his self acquisitions. His case is that though he sold items 4,7 and 8 of scheule -1 of Exhibit A1 partition deed on 1.2.1982 as per Exhibit A7 and on the same day as per Exhibit A8 purchased items 6 to 8 of the plaint schedule, the consideration received by the sale of Exhibit A7 properties were adjusted towards the amount already spent by him for the purposes of the temple. The 1st defendant has not produced any accounts or other acceptable items of evidence to establish that after the date of execution of Exhibit A11, he has incurred any expenditure in connection with the temple out of his own funds. He has no case that he submitted accounts to the members of the family. He has also no case that any expenditure over and above the income was necessitated and it was brought to the notice of the members of the trust. He does not say that he appraised the members of the Tharavad or the signatories of the Trust Deed of the necessity of any expenditure to be shared by them for the purpose of renovation or repair of the temple or for the affairs of the trust. The case of the plaintiffs is that huge amounts were collected by the 1st

defendant from the persons who are appointed as teachers and non-teaching staff and that he collected amounts from the public. In the absence of any accounts having been submitted to the members of the family, it cannot be believed and accepted that the 1st defendant had spent his own funds for the construction of buildings or for the maintenance and administration of the trust properties. If the case put forward by the 1st defendant that his own funds were utilised for the purpose of the trust is to be accepted, that is a clear case of mixing up of the assets of the Trust with the personal funds of the 1st defendant. As the Managing trustee, the 1st defendant could not indulge in such acts. Exhibits B12 to 14 vouchers and daily cash book were not proved in accordance with law and the court below was not satisfied with the genuineness of the contents of the documents and veracity of these documents. There is no acceptable evidence to indicate the exact income and expenditure received and incurred by the 1st defendant. It is clear that 1st defendant did not take the members of the family into confidence. The sequence of events and the evidence would indicate that he acted according to his whims and fancies and not in accordance with the collective wisdom and opinion of the members of the

family. The 1st defendant did not act in accordance with his position as the Managing Trustee. The trust and confidence reposed in him by the members of the family were not reciprocated by the 1st defendant as is evident from the contentions put forward by him. The court below rightly held that items 6 to 8 of the plaint schedule belong to the family trust and that the 1st defendant has no individual or independent rights over the same. The trial court was also justified in holding that the school buildings and accessories therein also belong to the trust.

9. The case put forward by the 1st defendant is that Exhibit A11 was executed under threat, coercion, force, undue influence and fraud. He attributes all these acts against some of the members of the family. The 1st defendant kept aloof from the court. He did not adduce any evidence, evidently to keep away from the cross-examination by the plaintiffs and supporting defendants. It is contended that the 1st defendant was suffering from heart ailments. It is hard to believe that such an old and ailing man was subjected to force, intimidation and coercion by the members of his family. There is no evidence to indicate that the allegations made by the 1st defendant against his own family

members has a semblance of truth. The vitiating circumstances like fraud, coercion and undue influence are matters to be proved by the person who alleges the same. It is held by the Supreme Court in 1967 SC 341 that fraud is to be proved like a charge in a Criminal case. The burden of proof lies on 1st defendant to prove the grounds of challenge against Exhibit A11 dated 7.4.1982. The suit was filed in 1985. The 1st defendant has not stated anywhere except in the written statement that he was made to execute Exhibit. A11 under threat, coercion, force and fraud. The court below rightly rejected the contentions put forward by the 1st defendant in this regard. The court below has considered all the aspects of the case, the evidence on record and the contentions put forward by the parties. I am in agreement with the reasonings and conclusions arrived at by the court below. No grounds are made out for interference in appeal. The appeal lacks merits and it is dismissed. However, taking into account the relationship between the parties, there will be no order as to costs.

(K.T. SANKARAN, JUDGE)

ma

R.BASANT, J

C.R.R.P.No.

ORDER

21ST DAY OF JULY 2006